

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELAINE BENJAMIN,

Plaintiff,

v.

ORDER
11-CV-571

THE FOSDICK MACHINE TOOL COMPANY,
THE FOSDICK MACHINE TOOL COMPANY
n/k/a MAKINO, INC., formerly known as
LEBLOND INCORPORATED, and
TUTHILL CORPORATION, doing business
under the name of TUTHILL ENERGY
SYSTEMS,

Defendants.

This personal injury action is pending on diversity jurisdiction under 28 U.S.C. § 1332 and was referred for pretrial proceedings to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. § 636(b)(1). On February 26, 2013, defendant Tuthill Corporation, doing business under the name of Tuthill Energy Systems, filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56.¹ Defendant Tuthill argued that, as a former owner of a radial drill press plaintiff Elaine Benjamin alleges she was operating when she sustained personal injuries,

¹ Defendant Tuthill filed an earlier motion for summary judgment that was denied as premature. Dkt. Nos. 56, 55. When the matter was recommitted to the Magistrate Judge, he limited discovery to potentially dispositive issues identified during proceedings on the motion for summary judgment. Dkt. No. 59. This motion for summary judgment is defendant Tuthill's second.

defendant was at most a “casual seller” and that: (1) defendant owed plaintiff no duties; (2) even if defendant owed a duty to warn of known latent defects, it did not breach such a duty to plaintiff; and, (3) defendant could not be found strictly liable on a products-liability cause of action.

On May 10, 2013, the Magistrate Judge filed a Report and Recommendation that recommends defendant Tuthill’s second motion for summary judgment be granted on the ground that defendant was a casual seller of the radial drill press. Dkt. No. 79. Plaintiff Benjamin filed objections to the Report and Recommendation on May 28, 2013. Dkt. Nos. 80-81. Plaintiff objects to the conclusion of the Report and Recommendation that defendant did not have a duty to warn plaintiff of known defects of the radial drill press and argued she was entitled to more discovery. *Id.* Defendant filed a response to the objections on June 13, 2013. Dkt. No. 83. Plaintiff filed a reply on June 27, 2013. Dkt. No. 85.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review of the Report and Recommendation, and after reviewing the submissions from the parties, the Court adopts the proposed findings and conclusions of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge McCarthy's Report and Recommendation, the motion for summary judgment pursuant to Fed. R. Civ. P. 56 of defendant Tuthill Corporation, doing business under the name of Tuthill Energy Systems, is granted. The Clerk shall terminate the action as against defendant Tuthill. The action is recommitted to Magistrate Judge McCarthy pursuant to the terms of the Court's August 4, 2011 Amended Text Order. Dkt. No. 9

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: July 18, 2013